

INSURANCE SEGMENTATION AS UNFAIR DISCRIMINATION: WHAT TO EXPECT NEXT IN THE WAKE OF *TEST-ACHATS*

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Abstract

The European Court of Justice has held that as from 21 December 2012 insurers may no longer treat men and women differently on the basis of their sex, thus prohibiting ‘gender-rating’ in insurance and related financial services throughout the European Union. In this article I look into the legislative and judicial processes leading up to this outcome as well as to the judgment itself in order to shed light on how the unisex rule came to be. I reflect upon what happened to sex as an actuarial factor and try to draw some conclusions on what the future might bring us, not only in the subject of sex discrimination but also taking into consideration the European Commission’s existing proposal on a similar directive touching upon the use of age and disability as actuarial factors. I conclude that although it is currently very difficult, perhaps impossible to provide an admissible justification for the practice of gender-rating, this does not mean that we should stop testing, as the premise on which the absolutist version of the unisex rule rest that gender-rating is always incompatible with the principle of non-discrimination has yet to be validated. I also conclude that there is good cause to believe that in the field of personal insurance age should continue to be used as a risk factor, but that some of the current practices involving both age and disability as risk factors might not pass the test of compatibility with the fundamental rights of the European Union.

Keywords: discrimination; inequality; segmentation; risk factors; sex; gender; age; disability; *Test-Achats*.

1. INTRODUCTION

The European Court of Justice has held that as from 21 December 2012 insurers may no longer treat men and women differently on the basis of their sex, thus prohibiting ‘gender-rating’ in insurance and related financial services throughout the European Union (*Test-Achats*, 2011).¹

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In Section 2 of this article I look into the legislative and judicial processes leading up to this outcome as well as to the judgment itself in order to shed light on how the unisex rule came to be. I observe how this rule came into being in its first life, its effectiveness significantly impaired by a so-called derogation, and how it took on an absolutist turn in its second, current life by virtue of the prospective invalidation of that derogation by the ECJ. I note that in the legislative process that led to the EU Gender Directive (2004) the absolutist version of the rule failed to obtain the unanimous approval of Member States and, in the judicial process that followed, the assumption upon which it rests that taking one's sex into account as a risk factor in the formulation of private insurance contracts is always incompatible with the fundamental rights of the European Union was never directly scrutinized by the ECJ.

In Section 3 I reflect upon what happened to sex as an actuarial factor and try to draw some conclusions on what the future might bring us, not only in the subject of sex discrimination but also taking into consideration the European Commission's existing Proposal on a similar directive touching upon the use of age and disability as actuarial factors (2008). I conclude that there is no substantive justification for the absolutist version of the unisex rule, as the premise that gender-rating is *always* incompatible with the principle of non-discrimination has yet to be validated. I also conclude that from a formal point of view there should be no cause for concern with a possible re-run of the ECJ's argument in *Test-Achats*, there being no inherent contradiction in the insurance-related provisions of the Proposal, as amended by the European Parliament (2009), and that from a substantial point of view there is good cause to believe that insurers will be able to provide evidence in support of the conclusion that in the field of personal insurance age should continue to be used as a risk factor, but that some of the current practices involving both age and disability as risk factors might not pass the test of compatibility with the fundamental rights of the European Union.

¹ Although this is often left unstated, I believe that statistical data used by insurers is based on biological sex, not gender. However, the expression 'gender-rating' is widely used in the literature. I shall use it as a reference to insurers' use of sex as a rating variable.

2. A WAKE-UP CALL: AN OUTRIGHT BAN ON GENDER RATING IN INSURANCE

2.1. The EU Gender Directive and the *Test-Achats* ruling

Article 5(1) of the EU Gender Directive (2004) generally prohibits the practice of ‘gender rating’ in insurance: the use of sex as an actuarial factor in the calculation of premiums and benefits for the purposes of insurance and related financial services.²

Reference is made in the EU Gender Directive to the universal right to equality before the law and protection against discrimination for all persons (EU Gender Directive, 2004, Recital 2) and to the fundamental principle of equality between men and women as set forth in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union.³ Such provisions would ‘require equality between men and women to be ensured in all areas’ (EU Gender Directive, 2004, Recital 4). The prevention of sex discrimination would require men and women not to be treated differently when they are placed ‘in a comparable situation’. Differences in treatment which ‘result from the physical differences between men and women do not relate to comparable situations and therefore do not constitute discrimination’ (EU Gender Directive, 2004, Recital 12). Otherwise, ‘differences in treatment may be accepted only if they are justified by a legitimate aim’ (EU Gender Directive, 2004, Recital 16).

The EU Gender Directive aimed to achieve ‘a common high level of protection against discrimination in all the Member States’, a purpose which ‘cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at Community level’ (EU Gender Directive, 2004, Recital 28). In insurance, the promotion of equal treatment between men and women would require the use of sex as an actuarial factor not to ‘result in differences in individuals’ premiums and benefits’ (EU Gender Directive, 2004, Recital 18). Such is the explanation provided for the general prohibition contained in Article 5(1) of the EU Gender Directive.

And yet the effectiveness of the unisex rule on the insurance business would be significantly impaired by the derogation contained in Article 5(2) of the EU Gender Directive, which permitted the application of proportionate differences in individuals’

² This directive was a follow-up to The EU Race Directive (2000) (EU Gender Directive, 2004, Recital 10). However, there are no insurance-specific provisions in the EU Race Directive. In addition to these, there was the EU Employment Equality Directive (2000). It laid down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. Although it does not mention insurance, it is a direct precedent to the European Commission’s Proposal, 2008. Both stem from what is now Art. 19(1) TFEU.

³ Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter has the same legal force as the treaties of the European Union.

premiums and benefits ‘where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data’.⁴

This derogation was exclusive of costs related to pregnancy and maternity, on the ground, it would appear, that the economic burden of human reproduction should not be allowed to rest on women’s shoulders alone (EU Gender Directive, 2004, Article 5(3) and Recital 20). In this case, the implementation of measures aimed at complying with the unisex rule at national level could at best be deferred by Member States for a period of up to 2 years as from 21 December 2007, the date of entry into force of the EU Gender Directive. The derogation contained in Article 5(2) more generously determined that Member States which had chosen to rely on the derogation – and all Member States did make use of this opt-out provision – were to review their decision by 21 December 2012.

The ECJ did not wait for such a decision to be made by Member States: on 1 March 2011, in what would be known as the *Test-Achats* ruling, the Court declared that this derogation would cease to be effective on 21 December 2012 (European Commission’s Communication, 2011, Para 3).

In order to assist Member States with the implementation of the *Test-Achats* ruling at national level, the European Commission issued a Communication on 22 December 2011. In this Communication, the European Commission recognized that this ruling would have implications in all Member States, given that all Member States still allowed gender differentiation for at least one type of insurance: life insurance (European Commission’s Communication, 2011, Para 3). So that there would remain no doubts as to the bearing of the *Test-Achats* ruling, the European Commission issued the following guideline to all Members States:

*As from 21 December 2012, the unisex rule contained in Article 5(1) must be applied without any possible exception in relation to the calculation of individuals’ premiums and benefits in new contracts.*⁵

⁴ In Recital 19, the English version of the EU Gender Directive qualifies the rule of Article 5(2) as an ‘exemption’ to that of Article 5(1), whereas the French version uses the term ‘derogation’ instead. Similar differences may be observed amongst the other official languages of this directive, the Italian and Portuguese versions using the equivalent to the French ‘derogation’, the German, Dutch and Spanish versions referring to an ‘exception’ to the rule. I am unfamiliar with the remaining official languages. In *Test-Achats*, the ECJ mostly uses the term ‘derogation’, possibly because French is both the Court’s official working language and the language of the case, which originated in Belgium.

⁵ European Commission’s Communication, 2011, Para 5 (stress added). On 6 February 2014, EIOPA—the European Insurance and Occupational Pensions Authority—issued a Report on the implementation of the *Test-Achats* ruling into national legislation, according to which in December 2013 it had already been implemented in 25 out of the current 28 Member States. According to this Report, in the three Member States where the *Test-Achats* ruling had not yet been implemented there was legislation to that effect in the process of being adopted. Such Member States were Italy, Luxembourg and Portugal.

2.2. How this rule came to be

In an earlier paper I have put forward the view that the *Test-Achats* ruling, whilst constituting a most welcome landmark in the pursuit of equality between men and women, had nonetheless gone too far by saying too little on the question of what separates admissible criteria of differentiation from inadmissible forms of discrimination (Rego, 2014).

This was a landmark decision marking a sharp turn away from the traditional view that insurers should be allowed to apply just about any risk assessment criterion, so long as it is sustained by the findings of actuarial science. It was not the first time that a judicial decision had ever exposed the naïveté behind the assumption that insurers' recourse to statistical data and probabilistic analysis, given their scientific nature, would suffice to keep them out of harm's way.⁶ However, the shockwaves it sent across Europe and the rest of the world were unprecedented, possibly because it was the first time such a universal ban on the use of sex as an actuarial factor had been put in place (Sass, 2014, 228-229). As stated in a recent international report, '[m]ost countries in the world have responded to the judgment in some way or another, and whether in the EU or not, the number of publications generated on the judgment has appeared to sensitise insurers universally of discrimination issues in insurance practices' (Kuschke, 2010, 31). I believe it would be fair to conclude that in the field of discrimination in insurance there is a before and an after *Test-Achats*.

No argument is made in this article against the decision in *Test-Achats*. However, it should be noted that in setting out the reasoning behind this decision the ECJ never found it necessary to answer the main question of substance which permeated the dispute – a question which had been thus phrased by Advocate General Julie Kokott:

*Is it compatible with the fundamental rights of the European Union to take the sex of the insured person into account as a risk factor in the formulation of private insurance contracts? That is, in essence, the question which the Court has to examine in the present reference for a preliminary ruling.*⁷

At the onset of a very succinct judgment,⁸ the Court acknowledged that in the progressive achievement of equality between men and women 'it is *the EU legislature* which (...) determines when it will take action, having regard to the development of economic and

⁶ Amongst earlier decisions touching upon the subject of discrimination in insurance I would single out the judgment of the Supreme Court of Canada in *Zurich Insurance Co. v. Ontario (Human Rights Commission)* as worthy of special notice in spite of its lack of direct impact on the promotion of equality, since in that case the Court dismissed an appeal sustained on the argument that differentiation in automobile insurance rates based upon age, sex and marital status was neither reasonable nor *bona fide* within the meaning of s. 21 of the Human Rights Code, 1981. See Lemmens, 2007.

⁷ Opening Statement of the Opinion, 2010.

⁸ The terseness of the reasoning in the judgment was criticized by Koldinská, 2011, 1632-1637.

social conditions within the European Union'. It then added that 'when such action is decided upon, it must contribute, *in a coherent manner*, to the achievement of the intended objective, without prejudice to the possibility of providing for transitional periods or derogations of limited scope' (*Test-Achats*, Para 20 and 21, added stress). In these lines there is an allusion to the true essence of the problem which would lead to the decision in *Test-Achats*: that of a fundamental incoherence between Article 5(1) and (2) of the EU Gender Directive (Nanopoulos, 2011, 506-508).⁹

The ECJ recognized that when this directive was adopted the use of sex as an actuarial factor was 'widespread in the provision of insurance services' and as such might call for a gradual application of the unisex rule, its full application being preceded by 'appropriate transitional periods' (*Test-Achats*, Para 22 and 23).

The Court then evoked the often-quoted maxim that 'the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified' (*Test-Achats*, Para 28).¹⁰ Rather than make its own assessment of whether or not the distinction under analysis referred to comparable situations, the Court chose to rely on the legislature's prior assessment, as set forth in the EU Gender Directive. Recital 18 'expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals', which meant that this directive was 'based on the premis[e] that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable' (*Test-Achats*, Para 30). And that was that.

The ECJ found that this premise did not sit well with a rule such as that contained in Article 5(2) of the EU Gender Directive. Based on the legislature's premise and qualification, the Court concluded that it was incompatible with Articles 21 and 23 of the Charter, because it allowed a self-proclaimed 'derogation' from the rule of equal treatment of men and women to persist indefinitely rather than lead to its gradual application (*Test-Achats*, Para 30 to 32).

The ECJ never provided an answer to the question whether or not taking one's sex into account as a risk factor in the formulation of private insurance contracts was compatible with the fundamental rights of the European Union. The Court merely criticized the legislature's poor drafting technique, leaving one to wonder whether the Court's ruling

⁹ The author highlights that the ECJ merely pointed to a deficiency in Art. 5(2) of the EU Gender Directive, which, through its indefiniteness, frustrated the Directive's objective of combating discrimination under Article 19 TFEU and breached Arts. 21 and 23 of the Charter.

¹⁰ Reference was made in this instance to *Arvelor Atlantique et Lorraine*, Para 23.

might have been different if, rather than setting up a unisex rule and a derogation to that rule, the drafters of Article 5 had built the case of gender rating upon the ground of an alleged lack of comparability of situations – a door which had been left open by Recital 12 of the EU Gender Directive.

This incoherence between Article 5(1) and (2) and between Recitals 18 and 19 of the EU Gender Directive did not come about by chance. In its Explanatory Memorandum to the proposal of what would become the EU Gender Directive, the European Commission very clearly stated its view that ‘differences of treatment based on actuarial factors directly related to sex are not compatible with the principle of equal treatment and should be abolished’ (Proposal, 2003, 8).¹¹ The European Commission’s proposal coherently set forth the unisex rule which made its way to Article 5(1) and the justification contained in Recital 18 (Proposal, 2003, Art. 4/1, Recital 13). A maximum transitional period of six years was then contemplated, Member States being allowed to ‘defer implementation of the measures necessary to comply with paragraph 1’ until such period had elapsed ‘at the latest’ (Proposal, 2003, Art. 4/2).

As it happened, this proposal did not attain the unanimous approval of Member States. Article 5(2) and Recital 19 of the EU Gender Directive were a product of the difficult negotiations that ensued. Theirs was the wording devised to express the solution of compromise that would eventually enable the unanimous adoption of this directive. Ironically, the ECJ’s ruling in *Test-Achats* occasioned a return to the origin, given that the prospective invalidation of Article 5(2) converted the existing derogation into something akin to the deferred implementation mechanism originally devised by the European Commission (Reich, 2013, 268-269).

I have stated earlier on that no argument is made in this article against the decision in *Test-Achats*. To this I should add that I take no issue with the Court’s reasoning in *Test-Achats*. Its logic is impeccable. Nonetheless, I find it unfortunate that we have reached a point where the unisex rule ‘must be applied without any possible exception in relation to the calculation of individuals’ premiums and benefits in new contracts’ (European Commission’s Communication, 2011, Para 5) when (i) the rule, as it currently stands, has never been sanctioned by the unanimous approval of Member States; and (ii) neither has the premise, upon which it rests, that taking one’s sex into account as a risk factor in the formulation of private insurance contracts is always incompatible with the fundamental rights of the European Union been subject to a full scrutiny by the ECJ.

¹¹ The European Commission also expressed the view that this conclusion was ‘in line with the ruling of the European Court of Justice in *Coloroll*, to the effect that different contributions for men and women to an occupational pension scheme are discriminatory’ (also at p. 8).

3. WHAT WE SHOULD EXPECT THE FUTURE TO HOLD, NOT ONLY IN THE SUBJECT OF SEX DISCRIMINATION BUT ALSO IN RELATION TO DIFFERENTIATIONS BASED ON TWO OTHER RISK FACTORS: AGE AND DISABILITY

3.1. Could there be a re-run of the *Test-Achats* ruling?

In 2008 the European Commission adopted a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Proposal, 2008) as a follow-up to the EU Race and Gender Directives. In 2009 the European Parliament issued its own proposal amending the Proposal (Proposal, 2009). Although several years have gone by since this proposal was first adopted by the Commission, debate over it is still on-going, the Italian Presidency of the Council of the European Union and the European Commission having recently refuelled it by releasing a joint statement underscoring the need to make progress on this proposal.¹²

The insurance-related provisions of the amended Proposal bear little resemblance to those of the EU Gender Directive. In the original Proposal, the European Commission had recognized that ‘age and disability can be an essential element of the assessment of risk for certain products, and therefore of price’ (Proposal, 2008, 8),¹³ and that ‘the use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product’ (Proposal, 2008, 5). It had also announced that it would ‘initiate a dialogue with the insurance and banking industry together with other relevant stakeholders to achieve a better common understanding of the areas where age or disability are relevant factors for the design and pricing of the products offered in these sectors’ (Proposal, 2008, 5).

In the amended Proposal, as it stands, no ‘derogation’ is proposed to the non-discrimination principle, the proposed wording making it reasonably clear that some differentiations based on age and/or disability would be permitted, not by releasing financial service providers from the principle of non-discrimination, but because in such cases different treatment ‘should not be regarded as constituting discrimination’ (Proposal, 2009, Recital 15).¹⁴ Therefore, if the proposed wording should remain the same, there should be no cause for concern with a possible re-run of the ECJ’s argument in *Test-Achats*,

¹² See the summary and main conclusions of the Joint High Level Event on Non-Discrimination and Equality held in Rome on 6-7 November 2014.

¹³ There is no definition of ‘disability’ in the Proposal, but the term could be broadly defined so as to include all ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’ (UN Convention on the Rights of Persons with Disabilities, 2006, Art. 1(2)).

¹⁴ See also Art. 2(7) of the Proposal, 2009.

there being no inherent contradiction in the insurance-related provisions of the amended Proposal.

3.2. Should there be a re-run of the *Test-Achats* ruling?

3.2.1. *Sex as a risk factor*

What about the ruling itself and its restrictive impact on the freedom of contract? In *Test-Achats* the ECJ did not tackle the question whether there is a sufficient substantive justification – in other words, a good enough reason – for an outright ban on gender rating – whether taking one’s sex into account as a risk factor in the formulation of private insurance contracts would be incompatible, in every instance, with the fundamental rights of the European Union. Indeed, the premise that gender-rating is *always* incompatible with the principle of non-discrimination has yet to be validated.

Discrimination in insurance as a topic seems to summon a head-on collision between two apparently very different egalitarian accounts of distributive justice: on the one hand, there would be an ideal of justice fundamentally grounded on the notion of human dignity, on individual rights and liberties; an ideal which resonates with the Kantian categorical imperative that no human being should be treated simply as a means to an end but rather as an end in him or herself. On the other hand, there would be the ideal of justice more commonly known in the insurance industry as actuarial fairness, where, in order to treat equal situations equally and different situations differently in the exact measure of that difference, that is to say, in order to have each person pay a premium that exactly matches his or her own individual risk, insurers must disregard what is unique about each person and focus on (a limited number of) characteristics that allow them to classify that person into a risk group.¹⁵

This is so because at the root of the insurance business is the law of large numbers, which is a principle of probability theory according to which, the larger the number of analogous exposure units independently exposed to loss, the closer the actual loss will be to the value of the expected loss (for instance, Aitken, 2010, 102). In a nutshell, ‘insurance is about transforming uncertain adverse events with uncertain outcomes into statistical events with certain outcomes: the expected losses that the payment of the premium reflects’ (Landes, 2014, 1). If they are to do that, insurers must treat persons as numbers, so to speak. Is this incompatible with the fundamental rights of the European Union?

¹⁵ The Supreme Court of Canada took note of this conflict between ‘the determination of insurance rates and benefits’ and ‘traditional human rights concepts’ in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, at pp. 322-323. See also Thiery, 2006.

Following the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the European Union has the same legal force as the treaties of the European Union. Article 21(1) reads as follows:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Discrimination based on ‘any ground’ is prohibited. The ECJ regularly evokes the maxim that ‘the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified’ (*Test-Achats*, Para 28).¹⁶ This will be so regardless of the ground relied upon in order to discriminate against someone. However, it makes a difference whether or not the ground for discrimination is *on the list*. Those that are on the list are the grounds that have been identified as being most likely to lead to discrimination, because historically they have been major sources of discrimination. Any differentiation based on a listed ground is presumed wrong but this is presumption is not an absolute one: differentiations will be allowed when the situations in question are found not to be comparable or when an objective justification is provided for such differentiation (Thiery, 2006, 9).¹⁷

In an earlier paper I have put forward the proposition that a twofold test aimed at narrowing the rules allowing insurers to differentiate on the basis of a ‘suspect classification’ should be used so as to separate admissible criteria of differentiation from inadmissible forms of discrimination (Rego, 2014).¹⁸ This test consisted of the following two questions: (1) is there evidence in support of the conclusion that the statistical findings under consideration have an explanation that is unrelated to some form of past discrimination? This question should be answered affirmatively in order for the differentiation to pass this part of the test, since statistical analysis, by using past data to predict the future, can be used as an instrument to perpetuate past injustices in a way that is incompatible with the promotion of equality. (2) Comparing the actuarial factor under scrutiny with every other possible factor, is there evidence to support the conclusion that that there is no other known factor which (i) would have been more suitable as a predictor of the relevant outcome or (ii) which would have been equally or even slightly less suitable for that purpose from an actuarial perspective but which would have been less burdensome from a human rights perspective? This question should also be answered affirmatively in

¹⁶ Reference was made in this instance to *Arcelor Atlantique et Lorraine*, Para 23.

¹⁷ The authors argue that ‘the legal possibility of justification of unequal treatment could function as the key to reconciling these different views on fairness in insurance classification and to bridge the insurance “group” tradition and the “individualistic” human rights tradition’.

¹⁸ The remainder of this paragraph contains a summary of the views I have put forward in that paper.

order for the differentiation to pass this part of the test, for the use of a suspect classification as a convenient surrogate criterion for other, more determining features would also fall short on promoting equality.

It is not the job of legal researchers to separate the statistical findings that can from those that cannot be traced back to discrimination. I suspect most would fail this test, so I shall focus on the one area where I believe sex might stand a chance of passing both legs of the test: life insurance.

Every time and everywhere in the world women seem to outlive men. There is much debate on the reasons behind this gap both from a sociological and from a biological perspective (Seifarth, 2012). To the extent that social factors are found to explain the gap, these results might well be traced back to discrimination, as happened with the undisputed statistical finding that on average, white Americans live longer than black Americans, which formed the basis of different pricing by American insurers until the practice was eventually eradicated in the 1960s (Gaulding, 1995, 1659–1660; Olshansky, 2012). Nonetheless, in spite of the differences in opportunities that appear to explain the race gap in the United States, black women still outlive white men in the U.S.

Inasmuch as biological factors are found to lie behind the sex gap, sex as a risk factor does have a chance of one day passing the first leg of the test. Indeed, as set forth in Recital 12 of the EU Gender Directive, differences in treatment which ‘result from the physical differences between men and women do not relate to comparable situations and therefore do not constitute discrimination’. Mere correlation will not suffice, but if a causal relation is found then different treatment does have a chance, because, to the extent that the reason behind the statistical finding lies in biology, it will not be due to some past form of discrimination. Of course in order for this differentiation to pass that first leg of the test it will not be enough to establish that the sex gap is *partially* caused by biological factors. A time may come when such factors might be the only ones left influencing sex differences in longevity, in which case different treatment would be in the clear.

Surely the use of sex as a risk factor will not pass the second leg of the test if it is used as a surrogate for other, more determining features. The European Commission has found that even in life insurance insurers’ use of sex was based on ease of use rather than real value as a guide to life expectancy (Proposal, 2008, 8).¹⁹ Other factors, such as marital status, socio-economic background, employment, regional area, smoking and nutrition habits, were shown to be more relevant. But what if sex is used *in addition to*, rather than instead of, all the other more determining features?

Even if current actual usage of sex as an actuarial factor had been found lacking in every single instance, it is submitted that this is not a good enough reason to stop testing. The

¹⁹ See also the Opinion of Advocate General Kokott, 2010, *maxime* Para 67.

presumption of wrongness that goes along with differentiations based on a suspect classification is just that – a presumption. If in the case of sex as an actuarial factor this presumption currently proves very difficult, perhaps impossible to rebut, this is not the same as establishing that in abstract all gender-rating would necessarily entail a violation of the principle of non-discrimination. And yet every use of sex as a risk factor is currently off limits in the European Union, without any possible exclusion, as a practical result of *Test-Achats*.

At this point I should like to refer to the use of statistical findings in the field of evidence-based medicine. Since the 1950s there has been a slow but steady paradigm shift in the healthcare decision-making process towards a practice of ‘integrating individual clinical expertise with the best available external clinical evidence from systematic research’ (Sackett, 1997, 3). Since then, various studies have been undertaken comparing traditional clinical and model-based statistical diagnosis methods, to the overwhelming conclusion that these mechanical versions of Dr. House²⁰ systematically outperform their human counterparts, proving to be on average 10% more accurate in diagnosing individual patients’ medical conditions (Grove, 2000). It is one thing to identify a pre-existing disease on the basis of the symptoms that the patient is already experiencing and quite a different thing to estimate a person’s time of death. Nonetheless, in both scenarios statistical findings are used to make a more informed decision over something for which not enough information is available. It would be safe to assume that in all these studies the patient’s sex would be one amongst many pieces of information fed to the model so as to obtain a diagnosis. It is hard to point the accusing finger at this practice in the face of such ample evidence that this recourse to statistical data actually *improves* our perception of the individual.

This goes to show that statistical findings *may* serve as a tool for the better understanding of the individual, doing away with the notion that the group-based approach to the individual would always entail a head-on collision with human rights.

3.2.2. Age and disability as risk factors

Every suspect classification bears its own history. Whereas in the U.S. the greatest effort has been placed in combatting racial discrimination,²¹ in Europe more emphasis has been laid on ensuring equal treatment between persons of different nationalities and of different sex. Article 119 of the Treaty establishing the European Economic Community (1958) already laid down the ‘principle of equal remuneration for equal work as between men and women workers’. Since then, equal treatment of men and women gradually ‘took its place

²⁰ *House* is an American television series originally broadcast by Fox.

²¹ See *Adarand Constructors, Inc. v. Peña*, 1995.

at the forefront of EU social policy' (Ellis, 2012, 24).²² Sex is foremost amongst the suspect classifications listed in Article 21 of the Charter. Risk factors such as age or disability have thus far not been subject to as intense a scrutiny in the European legal arena. Although they have also been singled out in Chapter III of the Charter, when it comes to the promotion of equality the strongest language is to be found in Article 23.²³

The European Commission seems more willing to accept insurers' use of age or disability as risk factors, having expressed the view that at least 'under certain conditions' such use would 'continue to be allowed' under the Proposal, as 'it would not be considered discriminatory' (European Commission's Communication, 2011, Para 20).

The European Commission sustains the view that when it comes to assessing one's life expectancy persons of a different age are not in a comparable situation, which is to say that in life insurance the use of age as a rating variable is not discriminatory (European Commission's Communication, 2011, n. 17).

Even though my background in law does not place me in the best position to conclude whether and to what extent age is a determining factor in risk assessment, I believe that it would be safe to assume that when it comes to life insurance, and more broadly in the field of personal insurance, insurers should be able to demonstrate that a person's age is an indispensable element in the evaluation of that person's risk.²⁴

However, if a lesson should be taken at all from *Test-Achats*, it would be that insurers should beware of making use of suspect classifications in circumstances where no such evidence is readily available or widely accepted by the scientific community. Age is used by insurers as a risk factor in a multitude of insurance classes, oftentimes as a surrogate for behavioural traits such as reckless driving.²⁵ The amended Proposal's emphasis on 'objective and verified medical facts' and 'undisputed medical knowledge that comply with

²² Marano, 2012, argues that race, ethnicity and sex, differently from age and disability, would no longer be 'socially accepted criteria for distinguishing within the European Union'.

²³ Sex discrimination is the subject of Article 23, age is the relevant factor in Articles 24 (young age) and 25 (old age) and disability in Article 26. At least with regard to age, there is ample consensus that 'a wider range of justifications for different treatment on grounds of age may be available than in relation to grounds such as sex or race' (Schick, 2011, 778). The author argues that the ECJ adopts a looser or more lenient standard of judicial review in age-related differentiations than in cases dealing with sex or racial discrimination (where a strict standard of scrutiny was found to be more appropriate).

²⁴ See Civic Consulting's *Study on the use of age, disability, sex, religion or belief, race or ethnic origin and sexual orientation in financial services, in particular in the insurance and banking sectors* (2010), commissioned by the European Commission, , pp. 54-55. According to this study, it is in life insurance that a person's age 'most obviously operates as a key risk factor', life insurers having access to 'data which is likely to be fuller and more convincing than in any other line of insurance' (p. 54). This conclusion would be consistent with the finding by Kuschke, 2014, that '[s]tatistical discrimination is often used and tolerated, for example, when older people are charged more for life insurance, and people with a medical history are charged more for health insurance' (p. 5).

²⁵ According to Civic Consulting, 2010, there is 'convincing evidence illustrating the relationship between driver age and the incidence of motor accidents' (p. 39).

medical data collection standards' (Proposal, 2009, Recital 15)²⁶ appears to be aimed at leaving out precisely this sort of behavioural stereotyping.

The Proposal's reference to proportionality (Proposal, 2009, Article 2(7))²⁷ is also significant, as it would be unduly burdensome to stop using age as a risk factor in personal insurance but perhaps not elsewhere. Proportionality also appears to call for insurers to abandon the use of ample age bands because their use might lead to a disproportionate difference in treatment between two persons of a slightly different age but who happen to fall on different sides of an age band boundary. In addition, if the use of age as a rating variable is found not to be discriminatory in personal insurance, its use as a ground for refusing to provide insurance altogether might be found not to comply with the principle of proportionality.²⁸

The same could be said of the refusal to provide insurance to a disabled person. However, disability as a risk factor poses an additional set of challenges to the insurance industry: that related to the nonexistence of reliable statistical data. An insurer might be led to deny coverage to a disabled person because it simply lacks the data that it would require in order to evaluate that risk, such as in the case of a person suffering from a heart condition who has been subject to ground-breaking surgery, there being no data drawn from the past with which to assess that person's life expectancy. Lack of reliable statistical data does not appear to be a valid excuse for differentiation under the amended Proposal.²⁹

4. CONCLUSION

The unisex rule on insurance premiums and benefits first came to being with the entering into force of Article 5 of the EU Gender Directive, in 2004, its effectiveness significantly impaired by a so-called derogation. However, it took on an absolutist turn by virtue of the prospective invalidation of that derogation by the ECJ in the *Test-Achats* ruling, effective as from 21 December 2012.

²⁶ See also Proposal, 2009, Article 2(7).

²⁷ Final section of Article 2(7) of the amended Proposal: 'The service provider must be able to objectively demonstrate significantly higher risks and ensure that the difference in treatment is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are proportionate, necessary and effective.'.

²⁸ This conclusion appears to be in line with the findings by Kuschke, 2014, that 'one should not allow insurers the luxury of an absolute exclusion based solely on a general discriminatory factor' (p. 33) and that '[f]rom the data extracted from case law, judgments and rulings in the national reports, it appears that the outright refusal of providing cover is often held to be unjustified, yet that premium adjustments or a differentiation in the selection of benefits and policy terms and conditions was more readily justified and acceptable' (pp. 33-34).

²⁹ Which, again, would be consistent with the finding by Kuschke, 2010, that '[t]he mere absence of statistics is not enough to irrefutably prove that there is no alternative to the discriminatory practice. Difficulty alone in providing statistical or actuarial information has never been accepted as an excuse for discriminatory conduct that is contrary to human rights' (p. 33). In this instance the report refers in particular to *Zurich Insurance Co. v. Ontario (Human Rights Commission)*.

In the legislative process that resulted in the EU Gender Directive, the absolutist version of the rule had failed to obtain the unanimous approval of Member States. In the judicial process that would lead to the *Test-Achats* ruling, the assumption upon which it rests that taking one's sex into account as a risk factor in the formulation of private insurance contracts is always incompatible with the fundamental rights of the European Union was never directly scrutinized by the ECJ.

Even if current actual usage of sex as an actuarial factor had been found lacking in every single instance, even if it is currently very difficult, perhaps impossible to provide an admissible justification for the practice of gender-rating, this is not a good enough reason to stop testing. There is no substantive justification for the absolutist version of the unisex rule: the premise that in abstract gender-rating necessarily entails a violation of the principle of non-discrimination has yet to be validated.

From a formal point of view there should be no cause for concern with a possible re-run of the ECJ's argument in *Test-Achats*, there being no inherent contradiction in the insurance-related provisions of the Proposal, as amended by the European Parliament. From a substantial point of view there is good cause to believe that insurers will be able to provide evidence in support of the conclusion that at least in the field of personal insurance age should continue to be used as a risk factor. However, some of the current practices involving both age and disability as risk factors, such as that of using age as a surrogate for behavioural traits or of refusing coverage on the ground of lack of available data on a given disability, might not pass the test of compatibility with the fundamental rights of the European Union.

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